

DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

J.G. HARRINGTON
DIRECT DIAL 202-776-2818
jharrington@dlalaw.com

WASHINGTON, D.C.

1200 NEW HAMPSHIRE AVENUE, N.W. • SUITE 800 • WASHINGTON, D.C. 20036-6802
TELEPHONE 202-776-2000 • FACSIMILE 202-776-2222

ONE RAVINIA DRIVE • SUITE 1600
ATLANTA, GEORGIA 30346-2108
TELEPHONE 770-901-8800
FACSIMILE 770-901-8874

December 8, 2004

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 - 12th Street, SW, Room 8B201
Washington, DC 20554

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DEC - 8 2004

Federal Communications Commission
Office of Secretary

Re: Unbundled Access to Network Elements
Review of the Section 251 Unbundling Obligations of
Incumbent Local Exchange Carriers
WC Docket No. 04-313 and CC Docket No. 01-338
Written Ex Parte Communication

Dear Ms. Dortch:

I am writing on behalf of our client Cox Communications, Inc., in response to a proposal filed by Qwest Communications, Inc. in the waning hours of the above-referenced proceeding. Qwest asks the Commission, without prior notice in the *Notice of Proposed Rulemaking* or any meaningful opportunity for competitive LECs to respond, to adopt a radical change in its basic approach to evaluating whether unbundled network elements (UNEs) should be made available to competitive LECs. The Qwest proposal would eliminate all UNEs if competitors met a market share or build-out threshold, regardless of any other demonstration that competition would be impaired. For the reasons described below, Cox submits that the Commission should reject this proposal as inconsistent with the requirements of the *USTA I* and *USTA II* remand decisions of the U.S. Court of Appeals for the District of Columbia Circuit and as unreasonable, inaccurate and incomplete. Moreover, it is outside the scope of this proceeding.

The Qwest proposal is inconsistent with the *USTA* decisions

The Qwest proposal cannot be squared with the Court of Appeals decisions on unbundled network elements because the court has required the Commission to conduct a "granular" analysis and Qwest's proposal would be anything but granular. This means, as the *Notice* acknowledged, that the FCC must consider both specific markets and "which specific network elements the Commission should require incumbent LECs to make available."¹ The Qwest proposal, however, considers only markets, and would eliminate all unbundling regardless of whether there is a connection between retail market share and a particular element. For example, under the Qwest proposal, inside wire subloops no longer would be subject to unbundling in an affected market even if there were no economic substitute that would permit facilities-based competitive LECs to reach customers in multiple tenant environments ("MTEs"). Accordingly,

¹ *Notice*, ¶ 11. See also *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 426 (D.C. Cir. 2002) (the statute requires "a more nuanced concept of impairment" than can be reflected in blanket findings).

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the Commission would need a far more detailed record before it could legitimately draw the conclusion that eliminating the unbundling of each and every element in a market would satisfy the statutory impairment test.

The Qwest proposal makes unreasonable assumptions about markets.

Qwest's assertion that the Commission can safely relieve an ILEC of all unbundling obligations because competitors have captured at least 30 percent of the market glosses over important factual issues that the Commission would have to examine closely before making any such determination. Implicit in Qwest's proposal, for example, is the assumption that carriers that do not buy loops do not need UNEs to provide service. Yet, as the Commission concluded in the last phase of this proceeding (and as no carrier, including Qwest, challenged in the most recent appeal), even carriers that otherwise rely entirely on their own facilities often have to purchase inside wire subloops to compete in multi-tenant environments. Relieving ILECs of all unbundling obligations simply because they have lost market share ignores the reality that competitive LECs – even fully facilities-based ones – require inside wire subloops to fully compete throughout their service areas. Eliminating their access to such UNEs essentially would preclude such carriers from winning customers in MTEs, and in fact could force them to abandon existing MTE customers.

There are too many unanswered questions

Qwest's December 3 memorandum is, in essence, a sketch of the rules the Commission would have to adopt if it were to attempt to put the Qwest proposal in effect. The memorandum leaves almost all of the important substantive questions unanswered and thus fails to demonstrate that the Commission could meet the dictates of the statute and the D.C. Circuit's remands by adopting the Qwest proposal. For instance, Qwest fails to describe:

- How the Commission would assess whether an incumbent LEC application for elimination of the unbundling requirements properly delineated the relevant geographic and product markets;
- What specific services and service providers would count in making market share determinations;
- How an ILEC would be able to determine what percentage of a CLEC's customer base is served without UNEs;
- Whether market share is calculated based on customers served or number of lines (and how the number of lines would be determined);
- How wireless or Voice over IP providers should be treated in determining market share or customer locations passed;
- How ILEC affiliates, such as Cingular, would be treated in any analysis;
- How the Commission should define the term "competitive facilities";

- How the Commission would determine whether a customer is “passed” by a competitor;
- What facilities would be deemed to be close enough to “pass” a customer; or
- How facilities that are not intended to serve a specific customer location would be treated in the “customers passed” analysis.

Many of these questions involve difficult, yet fundamental judgments that demand the benefit of a full record and thoughtful analysis – something that simply cannot be developed at the eleventh hour.² In fact, the record in the Omaha forbearance proceeding cited by Qwest demonstrates that even the most central element of its proposed test – whether a facilities-based competitor has gained more than 30 percent “market share” – can be difficult to answer. In that proceeding, Qwest claims that it has lost 50 percent of the market in Omaha, yet Cox and others have demonstrated that Qwest made multiple errors in its calculation of market share and misinterpreted the information it used to support that claim.³

Complex issues of this nature accordingly must be given careful consideration. Indeed, since Qwest already has brought many of them to the Commission for resolution in the Omaha forbearance proceeding, there is no reason to shortcut the agency’s deliberations there by rushing to judgment here and adopting an ill-conceived, ambiguous and potentially far more reaching proposal at the last minute.

Adoption of the Qwest proposal would violate administrative law requirements

Regardless of the desirability of any proposal, the Commission cannot act without complying with its obligations under the Administrative Procedures Act. There are two separate reasons why adopting the Qwest proposal would violate basic APA principles.

² For example, questions concerning the extent to which wireless competition should be considered in a market share analysis would require the Commission to determine how much wireless functions as a substitute for landline service and how to address the participation of ILEC affiliates, notably Cingular and Verizon, in the marketplace. Similarly, the issue of the relevant geographic market is much more complex than Qwest suggests. Qwest’s proposal to permit ILECs to be exempted from unbundling for areas as small as a wire center is, among other things, inconsistent with the Commission’s approach to competitive analysis in every other area it regulates. Wire centers can cover very small areas, as little as several blocks in some cities, and there is no other context in which the FCC considers areas so small in any competition analysis. For that matter, the very concept of “wire center” no longer is easily defined because the development of competition has led to carriers having varying wire center boundaries, and even incumbent LECs may use the term differently in different states. In addition, permitting exemptions at that level could result in a patchwork of inconsistent regulation across a market.

³ A copy of the portion of Cox’s comments addressing Qwest’s market share analysis and demonstrating that it is erroneous is attached to this letter.

First, the Commission cannot adopt such a significant change in its basic UNE rules without specifically seeking comment. The Qwest proposal would represent a significant departure from the Commission's previous approach to determining whether UNEs should be made available, yet it was filed with the Commission just a few days before the close of the period for ex parte communications. Moreover, the proposal is beyond the scope of this proceeding, which is intended to address only those portions of the *Triennial Review Order* that were remanded by the Court of Appeals, not the basic principles governing unbundling or those UNEs (including DS0 loops and inside wire subloops) that were not the subject of the appeal. As a consequence there is nothing in the *Notice* to suggest that the Commission would consider any analysis that would exempt an ILEC from providing all UNEs in a geographic market, rather than conducting an examination of individual network elements, and other parties have not had a sufficient opportunity to comment on the proposal. Under well-established principles of administrative law, an agency cannot rely on "general notice that a new standard will be adopted" and must "describe the range of alternatives being considered with reasonable specificity" before it can adopt new rules.⁴ The Commission has not done so in this case.

Second, the Commission does not have sufficient evidence to support the thresholds that Qwest proposes for elimination of the UNE requirements or, for that matter, any other thresholds. Qwest provides no independent evidence for its suggested thresholds for exempting ILECs from unbundling requirements in its ex parte filings and there is nothing else in the record to support these or any other thresholds. In the absence of evidence to support a specific numerical threshold, the Commission does not have a reasoned basis for choosing a penetration level at which the exemption would be available. This is a basic administrative law requirement that the Commission cannot ignore.⁵

Even if this proposal is adopted, it should apply only to unbundling.

Although Qwest does not ask for the Commission to apply its proposed test to other issues, it is evident from Qwest's submissions in this and the Omaha forbearance proceedings that it believes that a market share test should be the standard under which all ILEC obligations are judged. However, the test Qwest proposes does not address any of the issues involved in the carrier-to-carrier interactions that are governed by the interconnection and other non-UNE provisions of 251(c). (These provisions govern, among other things, a competitive LEC's right to interconnect at any point and its right to collocation at the incumbent LEC switch.) There is no basis to apply a retail market share test to those obligations, because a market share test does not, for instance, address the extent to which interconnection with an ILEC remains necessary for all competitors. Consequently, if the Commission agrees to apply some market share test in this proceeding, a misguided decision that would ignore its duty to implement the statutory

⁴ *"Complex" Horsehead Resource Development Company, Inc. v. Browner*, 16 F.3d 1246, 1268 (1994) (citing *Small Refinery Lead Phase-Down Task Force v. EPA*, 705 F.2d 206, 549 (D.C. Cir. 1983); see also *American Federation of Labor v. Donovan*, 757 F.2d 330, 339 (D.C. Cir. 1985) (rule modification "cannot be seen as a 'logical outgrowth' of a proposal that gave no indication of a change at all").

⁵ See, e.g., *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000).

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impairment test as directed by the court, it should refuse to extend that test to other ILEC obligations under Section 251(c).

In accordance with the requirements of Section 1.1206 of the Commission's rules, the original and three copies of this letter are being submitted to your office on this date.

Please inform me if any questions should arise in connection with this letter.

Respectfully submitted,



J.G. Harrington

Counsel to Cox Communications, Inc.

cc: Hon. Michael K. Powell
Hon. Kathleen Q. Abernathy
Hon. Michael J. Copps
Hon. Kevin J. Martin
Hon. Jonathan S. Adelstein
Bryan Tramont
Christopher Libertelli
Matthew Brill
Jessica Rosenworcel
Daniel Gonzalez
Scott Bergmann
Jeffrey Carlisle
Michelle Carey
Linda Kinney
Thomas Navin
Austin Schlick
John Stanley

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Before the
Federal Communications Commission
Washington, DC

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In the Matter of

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Qwest Petition for Forbearance in the
Omaha Metropolitan Statistical Area

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)

WC Docket No. 04-223

COMMENTS OF COX COMMUNICATIONS, INC.

J.G. Harrington
Jason E. Rademacher

Its Attorneys

Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036
(202) 776-2000

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B. Significant Errors in the Factual Showing Make It Impossible for the Commission to Rely on Qwest's Claims.

The Petition contains a series of factual errors and mischaracterizations. These mistakes are both significant and surprising. Together they create a pattern of errors that renders Qwest's entire Petition unreliable.

The most important error is that Qwest does not appear to know what counties are in the Omaha MSA. The Petition says the MSA has five counties, but the Census Bureau says it has eight – Qwest omits one county in Nebraska and two in Iowa.⁴⁴ Qwest also apparently omits some counties – but not the same ones – from its population and household calculations, and comes up nearly 140,000 people and 70,000 households short of the totals from the 2000 Census.⁴⁵ Strangely, Qwest's calculations appear to include at least one county where it does not provide service while excluding counties that it does serve.

⁴⁴ Compare Petition at 7 (describing the Omaha MSA as consisting of Douglas, Sarpy, Washington and Cass Counties in Nebraska and Pottawattamie County in Iowa) with United States Bureau of the Census, *METROPOLITAN STATISTICAL AREAS AND COMPONENTS, December 2003, WITH CODES*, at <http://www.census.gov/population/estimates/metro-city/0312msa.txt> (describing the Omaha MSA as consisting of Douglas, Sarpy, Washington, Cass and Saunders Counties in Nebraska and Pottawattamie, Harrison and Mills Counties in Iowa).

⁴⁵ Compare Petition at 7 (population of MSA is 629,294 and number of households is 241,721) with United States Bureau of the Census, *Census 2000 PHC-T-29. Ranking Tables for Population of Metropolitan Statistical Areas, Micropolitan Statistical Areas, Combined Statistical Areas, New England City and Town Areas, and Combined New England City and Town Areas: 1990 and 2000 at 50*, at <http://www.census.gov/population/cen2000/phc-t29/tab02a.pdf> (showing total population of 767,041 and individual populations of counties in MSA); Table 4: Annual Estimates of Housing Units for Counties in Nebraska: April 1, 2000 to July 1, 2003 (HU-EST2003-04-31), Population Division, U.S. Census Bureau, July 23, 2004, at <http://eire.census.gov/popest/data/household/tables/HU-EST2003-04-31.pdf> (Nebraska data, showing 263,506 households in relevant counties); and Table 4: Annual Estimates of Housing Units for Counties in Iowa: April 1, 2000 to July 1, 2003 (HU-EST2003-04-31), Population Division, U.S. Census Bureau, July 23, 2004, at <http://eire.census.gov/popest/data/household/tables/HU-EST2003-04-19.pdf> (Iowa data, showing 48,034 households in relevant counties) (total of 311,540 households in Omaha MSA in 2000 Census). Based on the Census Bureau data, it appears that Qwest omitted Harrison, Mills,

These mistakes make it difficult for the Commission (and other parties) to know whether Qwest's statistics in the rest of the Petition relate to the same area as is covered by the forbearance request or even exactly where Qwest is seeking forbearance. For instance, it is impossible to evaluate Qwest's claim that its "DSL subscriber base in the Omaha area was approximately 6,000 in May 2004" without knowing if the "Omaha area" correlates to the MSA as described in the Petition, the actual MSA, or some other geographic subset.⁴⁶ Moreover, by understating the number of people and households in the MSA, Qwest makes it appear that competition is greater than it actually is.

Qwest's errors include its descriptions of Cox and Cox's services. Remarkably, Qwest claims that there are 360,000 residential "households that are current or potential Cox customers within the defined market," a number that exceeds Qwest's estimate of the *total* number of households in the MSA (241,721) by nearly 50 percent.⁴⁷ Separately, Qwest calculates that Cox is providing telephone service to approximately 148,000 households in the MSA based on Cox's

Pottawatomie and Washington Counties from its population calculations. It is not clear what Qwest omitted from its calculation of the number of households in the MSA.

⁴⁶ Petition at 12, n.38. Qwest's figure is particularly surprising in light of the Commission's own statistics on broadband service in Nebraska and Iowa. If Qwest's information is to be believed, its DSL penetration in the Omaha MSA constitutes only about eight percent of total DSL penetration in Iowa and Nebraska, even though the Omaha MSA accounts for 16.5% of the population of the two states. See High-Speed Services for Internet Access: Status as of December 31, 2003, Industry Analysis and Technology Division, Wireline Competition Division, rel. June 8, 2004, Table 7 (showing broadband lines in Iowa and Nebraska by service type). Given that Qwest almost certainly concentrated its initial DSL deployment in urbanized, higher income areas like the Omaha MSA, it is unlikely that this figure is accurate.

⁴⁷ Compare Petition at 7 (241,721 households in the MSA) with *id.* at 8, n.23 (claiming that Cox "revenue generating units" are equivalent to households Cox can serve in the MSA). This discrepancy likely arises because Qwest misunderstands the meaning of "revenue generating units," a term that refers to the total number of services (voice, video and data) purchased by Cox customers. See, e.g., Cox Communications, Inc., 2002 Summary Annual Report at 6, available at http://media.corporate-ir.net/media_files/irol/76/76341/reports/2002AR.pdf. Because many Cox customers choose to purchase multiple services, it is not possible to relate the number of revenue generating units to the number of homes passed.

report of 50 percent penetration. However, Cox calculated its telephone penetration based on the number of homes that actually purchase basic cable service, a significantly smaller number than the 295,000 "serviceable homes" used by Qwest.⁴⁸ In light of these mistaken assumptions, it is no surprise that Qwest overestimates Cox's actual number of customers by 30 percent.⁴⁹ In a petition that relies heavily (if inappropriately) on retail market share analysis, this is a serious mistake.

Qwest's errors concerning Cox extend even to the areas Cox serves. The Petition states that Cox "now offers CATV-based telephony service throughout all of Qwest's service territory in the Omaha MSA using its own coaxial fiber network."⁵⁰ Cox does not, however, provide service in six of the twenty-four wire centers identified as part of the Qwest service area in the Petition.⁵¹

In fact, Qwest's description of the wire centers in the Omaha MSA is itself inaccurate. More than fifteen months before the Petition was filed, the Nebraska Public Service Commission

⁴⁸ Petition at 12 n.38. In the same footnote, Qwest estimates the availability of cable modem service from Cox by saying that "each of these households [that purchase Cox telephone service] has direct access to Cox broadband service." It is not apparent, however, why Qwest believes that the number of Cox cable modem customers has any relation to the number of Cox telephony customers. Perhaps Qwest believes that Cox has mimicked the Qwest practice of tying DSL and telephone service, but that is not the case. While Cox offers discounted bundles of service, it does not require its Omaha customers to purchase either cable service or telephone service to purchase cable modem service.

⁴⁹ See, e.g., Virgil Larson, *Competition hot in Omaha phone war*, OMAHA WORLD HERALD, Sep. 17, 2003 at 1 (Cox has 106,000 residential subscribers).

⁵⁰ Petition at 8.

⁵¹ Petition at 19 n.60. The Qwest wire centers that are not served by Cox are Springfield in Nebraska and Glenwood-Mineola, Malvern, Missouri Valley, Neola and Underwood in Iowa.

issued an order, in a proceeding initiated by Qwest, consolidating five of the listed rate centers into two new rate centers.⁵²

Qwest's claims about the increasing level of competition in the Omaha MSA also rest on several questionable assumptions about the impact of DSL, wireless and voice over IP on Qwest's local exchange service. Qwest, for example, does not accurately characterize the reasons for the declining number of access lines it serves because the Petition fails to account for DSL service. Many "lost" access lines actually are second lines converted to DSL. This conversion results in an incremental increase in revenue to the incumbent LEC. Accordingly, excluding DSL from Qwest's description of the competitive landscape paints an incomplete picture.

Qwest engages in a similar sleight of hand with wireless services because it fails to acknowledge that a Qwest affiliate is a significant provider of wireless service in the Omaha MSA. For that matter, Qwest overstates the impact of both wireless service and voice over IP, neither one of which has taken any significant number of customers from traditional wireline service.⁵³ For instance, Qwest's own witness in a pending Iowa deregulation proceeding has stated in prefiled testimony that only four percent of disconnects are customers switching to wireless.⁵⁴ Similarly, analyses that simply show wireless minutes increasing must be

⁵² See *Order Approving Rate Center Consolidation*, App. No. C-2830/PI-66, Neb. Pub. Serv. Comm'n, Mar. 11, 2003.

⁵³ See, e.g., *Number Portability: Implementation and Progress*, FCC Presentation, May 13, 2004, at 5, available at <http://hraunfoss.fcc.gov/edocs-public/attachmatch/DOC-247179A1.pdf> (wireline to wireless ports are less than 3.6 percent of all numbers ported).

⁵⁴ Qwest Corporation Statement of Position and Exhibits of Robert H. Brigham, Iowa Utils. Bd., Docket No. INU-04-01.

accompanied by the recognition that those minutes often are replacing long distance minutes, not local calls.⁵⁵

Qwest also overstates the impact of voice over IP services. Despite Qwest's claims, voice over IP accounts for only a tiny fraction of local telephone service today.⁵⁶ In Iowa and Nebraska, voice over IP customers who want to replace their local telephone service must purchase broadband service, such as Qwest's DSL, to obtain service and, in any event, Qwest has made a commitment to be a voice over IP provider itself.⁵⁷

Taken together, these errors, omissions and mischaracterizations are quite important. They not only erode the reliability of Qwest's showing on market share and competition, but also raise questions about Qwest's ability to provide the Commission with accurate information in the first place. Many of these errors could have been avoided by checking easily-retrieved data, often simply by conducting an Internet search. Some of the errors, such as the inaccurate descriptions of the Omaha MSA and its population data, make Qwest's factual claims appear stronger than they are, and consequently should be decisionally significant on their own. Even the trivial errors are so numerous, however, that they create a pattern of disregard for the facts that the Commission cannot ignore, and should address by dismissing the Petition.

⁵⁵ The advent of wireless plans that charge the customer a flat amount until she reaches a monthly limit has encouraged this substitution.

⁵⁶ Vonage, the leading provider of voice over IP, serves only 225,000 lines customers across the country. Press Release, Vonage Now Offers 311 Dialing for city Information Services," Aug. 18, 2004, at http://www.vonage.com/corporate/press_index.php?PR=2004_08_18_0.

⁵⁷ Cox affiliates are beginning to provide IP-based voice services over their cable facilities, using technology that does not require customers to purchase a broadband connection, but that service is not available in Iowa or Nebraska at this time.